

LIBERTY

PROTECTING CIVIL LIBERTIES
PROMOTING HUMAN RIGHTS

**Liberty's response to the Ministry of
Defence consultation "*Better Combat
Compensation*"**

February 2017

About Liberty

Liberty (The National Council for Civil Liberties) is one of the UK's leading civil liberties and human rights organisations. Liberty works to promote human rights and protect civil liberties through a combination of test case litigation, lobbying, campaigning and research.

Liberty Policy

Liberty provides policy responses to Government consultations on all issues which have implications for human rights and civil liberties. We also submit evidence to Select Committees, Inquiries and other policy fora, and undertake independent, funded research.

Liberty's policy papers are available at

<http://www.liberty-human-rights.org.uk/policy/>

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EXECUTIVE SUMMARY

Combat immunity plays an important role, since it stops commanders and other soldiers from being pursued for negligence committed during the extremely difficult circumstances of combat – threatening risk-averse decision-making to the detriment of the armed forces' objectives and the safety of UK troops. But the MoD's proposals would make it far easier for the MoD to evade the accountability that troops, their families, and the public deserve. We call upon the MoD to drop these nakedly self-serving proposals.

Deaths or injuries that occur as a result of negligent procurement or training mistakes should not amount to mistakes made in the course of combat, and ought not to be covered by combat immunity. They constitute a breach of the duty of care owed by the MoD to its soldiers from which it would not be reasonable to grant the MoD immunity.

Were these proposals implemented, historic legal cases which have shed light on the serious failures of the MoD to treat our soldiers properly during the wars in Afghanistan and Iraq might not have come to light. Not only would their families be denied any legal redress and compensation, but future soldiers might go to war at risk of suffering the same errors the MoD continues to make.

A basic feature in any democracy is that nobody – Government included – should be a judge in their own case. It is constitutionally inappropriate to bar these cases from being considered by the independent judiciary, and seek instead to bury them in internal and potentially secretive processes which are based on MoD and MoD-appointed decision makers.

There also remains the strong possibility that the scheme will deliver lower awards for individuals than a court would have done, as well as shutting down accountability and learning from mistakes. If the government is sincere in its wish to improve the system for service personnel and their families, it would engage in good faith with legal challenges and take steps to address these issues instead of seeking to exclude the oversight of the court in military cases.

A soldier's obligation to fight does not include the duty to suffer avoidable and unreasonable errors in planning, provision, and training, far away from the field of battle. These proposals benefit no one but politicians and planners at the Ministry of Defence. They are a grave insult to soldiers and their families.

Introduction

1. Launched in July 2013, Military Justice is Liberty's campaign to protect and uphold the human rights of those serving in our Armed Forces. We believe that the rights of service men and women are just as deserving of protection as those of civilians and we have been campaigning for changes to the military justice system to make it fair for all service personnel. Our work in this area has included public campaigning, policy development, and litigation on behalf of service men and women and their families.

2. We represent the sisters of the late Corporal Anne-Marie Ellement, a member of the Royal Military Police who took her own life following the dismissal of her allegation that she had been raped by 2 RMP colleagues without a competent police investigation. Using the Human Rights Act we secured a second inquest into her death which revealed widespread bullying and a lack of care. We also secured a new criminal investigation into her rape allegation. In response to the inquest, the Ministry of Defence (MoD) finally agreed to establish a Service Complaints Ombudsman. In October 2015, the Director of Service Prosecutions announced that following the fresh criminal investigation, two former soldiers had been formally charged with Cpl Ellement's rape. The two men were acquitted at a court martial in April 2016. Following the threat of legal proceedings by the family, the Royal Military Police finally formally apologised to the family for failing to investigate properly the allegation of rape Cpl Ellement had made before taking her own life. The RMP admitted that "mistakes were made" and that "Anne-Marie deserved better". While Cpl Ellement's family welcomed the apology, they made a heartfelt plea for an improvement in procedures. Her sister Khristina Swain said:

"The RMP let Anne-Marie down 100 per cent – please give her one last bit of respect and don't fail others. Don't let victims or families go through what our family went through. Not just the pain and grief – but having to fight just to get to the truth."

3. We also represent the families of the late Pte Cheryl James, Pte Sean Benton and Pte James Collinson – three of the four trainee soldiers who died at Deepcut Barracks from gunshot wounds between 1995 and 2001. Almost twenty years after the death of Cheryl James and using the Human Rights Act, her family secured a second inquest into her death. On the first day of the inquest, the MoD finally apologised to her family for failing Pte James and other young recruits like her. An order for a fresh inquest into the death of Sean Benton has also been made and a date for the listing of that case is awaited.

4. We act also for the families of two British soldiers who died at Ballykinler barracks in Northern Ireland in 2012 and 2013 within 3 months of each other. There was a spate of 8 other serious self-harm incidents on the same barracks during the 6-month period within which the men died. The reason for the deaths is not yet known, however, both had recently returned from active operations overseas and their mothers are concerned about a number of different aspects of their sons' experiences, including the provision of anti-malarial medication and the quality of mental health and other support made available to them upon their return.

5. Our experience representing those seeking truth and justice from the MoD causes us to be deeply sceptical about any proposals that would restrict the manner in which service personnel and their families can access the courts to hold the MoD to account. It is only the threat of legal action or by issuing legal proceedings in the courts that the MoD and the armed forces have faced up to many of their responsibilities and admitted their failings. Our clients have not found transparency, openness and a willingness to admit mistakes. Instead, they have been forced to fight for the truth in the most tragic and difficult of circumstances, facing opposition at every turn. In all of the above cases, it was only the courts that ensured that justice was done. Although these cases did not include negligence claims, the same points of principles apply.

6. Combat immunity plays an important role, since it stops commanders and other soldiers from being pursued for negligence committed during the extremely difficult circumstances of combat – threatening risk-averse decision-making to the detriment of the armed forces' objectives and the safety of UK troops.

7. But the proposals in the document would make it far easier for the MoD to evade the accountability that troops, their families, and the public deserve. In doing so, they not only risk denying justice to individuals but they make it more likely that mistakes will be repeated, lessons will not be learned and more harm will be caused in the future. To do this under the pretence of concern for serving men and women is callous and disrespectful. We call upon the MoD to drop these nakedly self-serving proposals.

Combat Immunity

Background

8. Combat immunity is a legal principle which provides an exemption from legal liability for members of the armed forces and the MoD within the context of armed combat. Where

combat immunity exists, the Government cannot be subject to legal challenge in the courts. The Government's first set of proposals would expand the doctrine of combat immunity.

9. As to why legislation on combat immunity is needed, the consultation paper asserts that, "there are outstanding questions as to whether the immunity should apply only in cases of actual conflict or to failures during the earlier stages of planning and preparation for combat operations."¹ This is not correct.

10. The law on combat immunity is very clear and was set out most recently in the Supreme Court case of *Smith*.²

11. Three of the claimants were relatives of British army personnel killed whilst serving in Iraq, and two more had themselves served and been wounded there. One person had been killed, and two others seriously wounded in a friendly-fire incident in which they and their Challenger tanks were fired upon by another tank group. Despite being sent into combat, none had received the training or equipment necessary to protect against the risk of such incidents occurring. Three other service personnel had been killed as a result of the detonation of Improvised Explosives Devices (IEDs) whilst on patrol in Snatch Land Rovers which, despite being vehicles highly vulnerable to IED attacks, had not been fitted with components capable of detecting them, nor were better-armoured vehicles, capable of shielding them from such attacks, provided.

12. The MoD had applied to strike out these claims even before any trial could be heard, relying upon the doctrine of combat immunity. The Supreme Court confirmed that claims for negligence committed during the course of combat cannot be brought, since they are barred by combat immunity. However, it also held that the MoD's decision-making as to equipment and procurement in the comfort of Whitehall "*ought not be immune from scrutiny*" – since those decisions fell well outside that immunity.

13. Indeed, the Court found that in resisting the claims the Government was not arguing for the law of combat immunity to simply be applied, but for it to be *extended*. As Lord Hope held, speaking for the majority:

"The Challenger claims are about alleged failures in training, including pre-deployment and in-theatre training, and the provision of technology and equipment.

¹ Consultation document, para 1.3

² *Smith and others v Ministry of Defence* [2013] UKSC 41.

They are directed to things that the claimants say should have been done long before the soldiers crossed the start line at the commencement of hostilities. The equipment referred to consists of target identity devices to provide automatic confirmation as to whether a vehicle is a friend or a foe, and situation awareness equipment that would permit tank crews to locate their position and direction of sight accurately. The claim is that, if the Challenger II tanks that were involved in this incident had been provided with this equipment before they went into action, the claimants' tank would not have been fired on. The training referred to is described as recognition training. It is said that this should have been provided pre-deployment and in theatre. Here too the essence of the claim is that these steps should have been taken before the commencement of hostilities. The claimants are careful to avoid any criticism of the actions of the men who were actually engaged in armed combat at the time of the incident."

14. As a result, he concluded that:

"To apply the doctrine of combat immunity to these claims would involve an extension of that doctrine beyond the cases to which it has previously been applied. That in itself suggests that it should not be permitted. I can find nothing in these cases to suggest that the doctrine extends that far."

15. But this is precisely what the Government's consultation now proposes. Had such measures been in place at the time of the Smith litigation, that case would not have been permitted to proceed to trial. The alleged failures on the part of the MoD to provide safe systems and equipment would not have been revealed and the inevitable result would have been that soldiers would be less well protected in the future. We agree that, as the Secretary of State for Defence remarks in his foreword to the consultation document, *"what is essential is that (the MoD) learn the lessons from our military campaigns constructively and with a proper sense of humility"*³. His proposals risk having precisely the opposite effect.

Extended definition of 'combat'

16. The potential impact of the proposals of course depends upon how "combat" is defined. At first blush, the proposal seems straightforward: *"our proposals do not affect any case which does not arise out of combat"*.⁴

17. However, the definition of "combat" that is proposed by the MoD is unacceptably expansive, going beyond the present legal definition of the term and will, on the MoD's

³ Consultation Foreword

⁴ Consultation document, paragraph 2.1

proposals, be: “*whether the harm – injury or death – occurred in the course of a UK military operation as a result of direct or indirect hostile enemy action, or as the direct result of misdirected targeting by friendly forces, or as the direct result of action taken to avoid hostile enemy action. If it did, it should be regarded as occurring in combat*”.⁵

18. Liberty is concerned that any deaths or injuries which are caused as a result of culpable mistakes in equipment, procurement, or training prior to or away from the battlefield (but occurring “in the course of a UK military operation”) would under this definition amount to ‘combat’ and would be excluded from the oversight of the courts. There is no clarity on when a “military operation” would be considered to have begun. It might include training for the operation. It might include procurement decision-making for a particular operation or conflict. Although the consultation document indicates that training injuries would be unlikely to be affected by the immunity,⁶ Liberty is concerned to note elsewhere in the document heavy reliance upon two other external papers which have expressly recommended that combat immunity *ought* to be extended to cover “warlike operations” which might include training.⁷ Deaths or injuries that occur as a result of negligent procurement or training mistakes should not amount to mistakes made in the course of combat, and ought not to be covered by combat immunity. They constitute a breach of the duty of care owed by the MoD to its soldiers from which it would not be reasonable to grant the MoD immunity.

Combat and peacekeeping

19. A further problem with the proposed definition is that it would extend to incidents that occur during a peacekeeping operation.⁸ Aside from the deep irony of seeking to redefine “*combat*” to include “*peacekeeping*”, this proposal would exclude the MoD even further from its legal obligations towards service personnel in situations potentially far beyond the battlefield. This is nothing but an attempt to insulate the MoD from challenge for its failures towards troops.

Territorial application of the doctrine

20. The proposals also exclude the MoD from legal action where an incident occurs in the UK. Liberty is concerned that in light of the expanded definition of combat, there is a strong risk that the Government will seek to claim that training incidents in the UK are covered by the definition of combat immunity. There have been a shocking number of deaths of service personnel during training exercises in the UK. There would be no justification for

⁵ Consultation document, paragraph 2.3.

⁶ Consultation document, Foreword, para 3.

⁷ The Fog of Law, Policy Exchange 2013; Clearing the Fog of Law, Policy Exchange 2015.

⁸ Consultation document, para 2.4.

the MoD seeking to avoid legal accountability for grave errors made during training, far from the battlefield, but even less for failures to provide proper equipment or exercise proper care whilst training is conducted. Soldiers and their families must receive compensation and redress when avoidable disasters occur.

Approach of the court

21. The paper also makes many other claims that are plainly untrue. For example, it claims that the effect of the *Smith* judgment is that “[j]udges are required to second-guess military decisions using criteria, appropriate in civilian life, to decide whether there was negligence or not in a battlefield situation.” This is false. As the Supreme Court found:

“At the stage when men are being trained, whether pre-deployment or in theatre, or decisions are being made about the fitting of equipment to tanks or other fighting vehicles, there is time to think things through, to plan and to exercise judgment. These activities are sufficiently far removed from the pressures and risks of active operations against the enemy for it to not to be unreasonable to expect a duty of care to be exercised, so long as the standard of care that is imposed has regard to the nature of these activities and to their circumstances.”

22. Combat immunity plays an important role, since it stops commanders and other soldiers from being pursued for negligence committed during the extremely difficult circumstances of combat – threatening risk-averse decision-making to the detriment of the armed forces’ objectives and the safety of UK troops. The *Smith* judgment in the Supreme Court restated this fundamental requirement.

Chilcot

23. The paper claims that it has taken the findings of the Chilcot Inquiry to heart. But it chooses to respond to them not by guaranteeing soldiers better treatment, but by denying them access to the courts. This is what the paper describes as “a proper sense of humility”. Were these proposals implemented, historic legal cases which have shed light on the serious failures of the MoD to treat our soldiers properly during the wars in Afghanistan and Iraq might not have come to light. Not only would their families be denied any legal redress and compensation, but future soldiers might go to war at risk of suffering the same errors the MoD continues to make.

24. Liberty rejects the Government’s proposals to extend the scope of combat immunity.

The enhanced compensation scheme

Background

25. The Government's second set of proposals would block service personnel and their families from using the courts to establish whether deaths or injuries were caused by the negligence of the MoD. Instead, those involved will be required to make a claim via a newly established compensation scheme.

Role of the Courts

26. The Government argues that civil litigation in the courts can be lengthy, frustrating and costly. This can certainly be the case. However it is disingenuous of the Government to ignore its own role in creating these problems and the ease with which it could resolve them. The frequent insistence by the MoD on resisting claims, aggressively defending cases in the courts, taking an unduly long amount of time to comply with court orders on matters such as the provision of documents, and the general lack of funding for the court system, are all significant factors in making litigation difficult. If the government is sincere in its wish to improve the system for service personnel and their families, it would engage in good faith with legal challenges and take steps to address these issues instead of seeking to exclude the oversight of the court in military cases.

27. The Government also appears to misunderstand the function of the court in cases which allege negligence. Service personnel and their families often turn to the courts to seek vital compensation to help them live their lives following injury. But they also use the courts to help uncover the truth in situations where things have gone badly wrong, both for their own knowledge and to help identify wider problems that need to be addressed to prevent further harm. In these situations, government accountability for mistakes and wrongdoing is not only right in principle, but is essential to protect our troops. A basic feature in any democracy is that nobody – government included – should be a judge in their own case. This is why we have an independent judiciary separate from the other bodies of state, whose processes and decisions are public. It is constitutionally inappropriate to bar these cases from being considered by this independent judiciary, and seeking instead to bury them in internal and potentially secretive processes which are based on MoD and MoD appointed decision makers.

Restriction of applicants

28. The consultation document states that civilian employees of Government or its contractors could not make a claim under the scheme. This would cover local interpreters

and drivers. If an injury arises from work undertaken on behalf of the British Government, it is discriminatory and unfair to exclude applications on the basis of civilian status.

Decisions on eligibility

29. The proposal that the MoD be responsible for deciding whether cases fall within the scheme or not is extremely problematic. As the defendant to allegations, the MoD should not be the gatekeeper to the scheme. In practical terms, it is certainly in the MoD's interests to reject claims at this early stage. It is no answer to say that service personnel or their families can challenge any decisions via judicial review. Judicial review can be a complex process, requiring legal expertise. Forcing individuals to jump through this extremely expensive hoop in order to overcome the decision of an institutionally partial decision-making body is deeply unfair, will cost both parties more money, and would be unlawful under article 6 of the European Convention on Human Rights.

30. In the alternative, it is proposed in the consultation that eligibility decisions be made by an independent assessor. This merely begs the question as to why the existing independent system – the court – is being bypassed. In any event, we do not agree that an MoD-appointed assessor would in fact meet the standards required to qualify as independent and impartial.

Information available to assessor

31. The next stage of the flawed system would be for an independent assessor to “*determine the level of award to be made to an individual*”. The consultation paper asserts that this process will “*take into consideration all the information which a court would take into account*”. Courts often have access to information because it is information which one of the parties has – via the court – been compelled the other party to provide. In our experience the MoD frequently resists requests for information unless a court intervenes or the threat of legal action is made. In the absence of a court order and adversarial process which identifies the need for certain pieces of information to be identified, it seems certain that much of the information currently used by courts will be unavailable to the independent assessor.

32. The paper also asserts that this system would “*avoid conflicting reports provided by the claimant and MoD*”. The questions to be determined in reaching an amount of compensation in these types of cases can be complex. Information – such as medical opinion – will not always be straightforward or homogenous in analysis. Dealing with differing medical opinions is not an unnecessary complication – it sits at the heart of the process of

independent adjudication. Judges are assisted in the task of determining how to apply this complex, and sometimes conflicting, range of information by the legal representatives of the various parties. An independent assessor will lack both the range of information the court currently receives and the support required to understand and test it.

Awards equivalent to those made by a court

33. It is unclear how, in the absence of a court system looking at these cases, an independent assessor would be able to make the same award that a court would make. It is a borderline nonsensical proposition. Each case is different, and often depends on a complex factual matrix including medical assessments, the prior employment potential of the individual involved, their care needs, and the impact on their life and employment prospects. There will be no way of knowing what a court would decide without the case going to court. This leaves open the strong possibility that the scheme will deliver lower awards for individuals than a court would have done, as well as shutting down accountability and learning from mistakes.

Grounds for awards

34. The statement that *“there would be no requirement on the part of the assessor to find the Ministry of Defence negligent in order to award damages”* causes further confusion. On what grounds will an award be made? Once a claim is deemed eligible for the scheme will the assessor be required to look at the cause of harm or only come up with a proposal for the compensation settlement? Is a system of strict liability being proposed? If the cause of harm is investigated, will the assessor report it? To what extent will the reasons for awards be open to public scrutiny and accountability?

Inequality of arms

35. The consultation paper also states that *“the presumption is that a claimant will not need legal representation”*. This would exacerbate the inequality of arms that exists when seeking to challenge the state. It is unthinkable that the MoD would not itself receive legal advice on these cases and it is unfair not to grant a claimant the same level of legal support.

36. The consultation document also makes no attempts to explain how – in the absence of lawyers – the assessor will receive and test even the most basic of information. Will there be the opportunity for oral hearings or will it be a paper based process? How will the parties be able to challenge assertions made by the other side? These questions have huge

implications for the access to justice of those involved, and it is irresponsible for the consultation paper to be silent on them.

Dispute resolution

37. A further problem arises with the assertion that “the MoD will normally accept this recommendation”. What will happen in situations where the MoD does not wish to accept the recommendation of the assessor? On what grounds will they be entitled to do so?

38. Individuals who disagree with the decision of the independent assessor will be able to make an appeal to the Pensions Appeal Tribunal. Once again, it is difficult to understand why the Government is determined to create alternative routes for deciding these matters when the courts already provide an appropriate independent mechanism to do so. In the absence of a commitment to provide legal aid and full merits appeals, it is also difficult to assess the extent to which this proposal would allow for full and thorough consideration of the issues.

Conclusion

39. A soldier’s obligation to fight does not include the duty to suffer avoidable and unreasonable errors in planning, provision, and training, far away from the field of battle. The lives of soldiers are just as valuable as the lives of civilians. The Secretary of State rightly asserts that we owe a moral obligation to those who serve in our armed forces – but he seems to think this consistent with denying them access to our courts and freeing himself to treat them improperly. He is wrong. Soldiers must be treated with the equal respect they deserve, and have the right to sue their employers when they are wronged. These proposals benefit no one but politicians and planners at the Ministry of Defence. They are a grave insult to soldiers and their families.